Cranworth in his judgment at page 402 had this to say —

"It is not a discretionary matter with the court when a debt is established and not satisfied, to say whether the company shall be wound up or not, that is to say, if there be a valid debt established, valid both at law and in equity. One does not like to say positively that no case could occur in which it would be right to refuse it; but, ordinarily speaking, it is the duty of the court to direct the winding up."

It is conceded that the court has an overriding discretion as to whether a winding-up order should be made but, as respectfully suggested by *McPherson* in the Law of Company Liquidation at page 59, the court's power to refuse an order is fairly strictly regulated and is exercised in accordance with principles which are relatively well-defined.

Now section 289 of the Companies Act provides that regarding matters pertaining to the winding-up of a company, the court may have regard to the wishes of the creditors and to the value of each of their debts for the purposes of determining whether a winding-up order should be made. The position with regard to the creditors opposing the petition has also been expressed in *Palmer's* Company Law, 20th Edition at page 701 where after considering the petitioning creditors' right to a winding-up order the following view is expressed —

"This right to a winding up order is, however, qualified by another rule, viz. that the court will regard the wishes of the majority in value of the creditors, and if, for some good reason, they object to a winding up order, the court in its discretion may refuse the order."

From the above text, it does appear that in exercising its discretion, the court will have regard for the wishes of the majority of the creditors if they have good reason for opposing the petition.

On this question, I would like to refer to the case of *P & J Macrae Ltd.*[4] In this case, the petitioners had obtained judgment for the sum of £685 which had not been paid; there were 11 supporting creditors to the extent of £2,136, 6 of whom were for under £100 and 2 for under £50; there were 42 opposing creditors to the extent of £19,000. The opposing creditors apart from expressing their desire to oppose the petition, did not assign any reason therefor. It was held by the Court of Appeal that the court had a complete and unfettered discretion in determining whether to make a winding-up order and that an Appellate Court would only interfere where the judge has exercised his discretion on the wrong principle; the bare fact of the opposing creditors being in a majority was not of itself sufficient, still less conclusive, to require a judge to exercise a discretion in their favour. In his judgment at page 236 *et. seq.*, Willmer L.J. has this to say —

"In the present case the opposing creditors have not seen fit to explain the reason for their opposition. If they have good reasons then the least they could do was to tell the court what those reasons are."

In the exercise of its discretion it is the duty of the court to weigh all the relevant matters and decide whether the *prima facie* right of the petitioning creditors to an order should give way to the wishes of some creditors who assign no reason for their opposition or who merely state that in their view the appellants might be in a position to pay their debts if allowed to continue to operate.

In the instant case, the appellants are unable to pay the debts of the petitioning creditors; in addition to that their total liabilities amount to about $3 million. They made arrangements to liquidate their debts but despite time having been given them they failed to live up to their promises. It is not disputed that they have not carried on business since June 1977 and by the provisions of section 218(1)(c) the court has a discretion whether or not to make a winding-up order where a company has suspended business for a whole year.

In their affidavit of October 18, 1977 the said Messrs. Bay Kwee Chai and Loh Chai Chon state —

"It is our intention to solicit the help of big hardware and building material suppliers to support us by giving us material on long term credit either on profit sharing basis or upon terms of payment of interest."

The only inference that can be drawn is that the appellants have no assets whatever and no current source of income and in order to continue to operate they will have to raise funds and probably create further indebtedness. It is also quite obvious that any loans to the appellants in view of its financial position must surely be secured by its assets as one cannot envisage a lender granting an unsecured loan in the circumstances: such a step would be to the detriment of the unsecured creditors.

In this case there is in my judgment abundant evidence that the company is insolvent and I so find. The opposing creditors have failed to show any good reason for their objection to the winding-up order being made. For the reasons abovementioned, I ordered that the company be wound up.

Order accordingly.

Solicitors: *Shook Lin & Bok; Goh Aik-Chew.*

NATIONAL JAYA (PTE.) LTD. v. HONG TAT MARINE SHIPPING PTE. LTD.

[O.C.J. (Wee Chong Jin C.J.) November 9, 1978]
[Singapore — Suit No. 4351 of 1975]

Shipping Law — Carriage of Goods by Sea — Rights and immunities — Hague Rules Article IV r. 5 — Scope of — "In any event" — Meaning of — Applicability of Article III r. 1 of Hague Rules — Whether Articles IV r. 5 applied to limit liability — Carriage of Goods by Sea Act (Cap. 184).

Bill of Lading — Evidence of contract of carriage by sea.

The plaintiffs in this case had marble slabs and glass mosaic worth $28,768 to send to Jakarta. The defendants agreed to ship them from Singapore to Merak, a port near Jakarta on the vessel "Hai Sing", and issued a Bill of Lading for these goods. The value of the goods was not declared by the plaintiffs before shipment and not inserted in the Bill of Lading.

The "Hai Sing" was a barge with no movable rudder. It had no steering power and was being towed by another vessel also belonging to the defendants. Its deadweight was approximately 800 metric tons but it was in fact carrying 966 metric tons of cargo on the said voyage to Merak. On approaching Merak, the tug had to anchor to await clearance the next day and proceeded to shorten the tow line. During

this operation the barge overran the tow line which became entangled necessitating cutting the tow line. The barge's rear anchor was dropped but because of strong wind and waves the anchor snapped and the barge was grounded. Water entered and flooded the hatches resulting in a total loss of the plaintiffs' goods. They claimed against the defendants for their loss.

The issue before the court was whether Article IV rule 5 of the Hague Rules as incorporated in the Carriage of Goods by Sea Act (Cap. 184) applied to limit the liability of the defendants. Article IV rule 5 provides that the carrier shall not "in any event" be liable for any loss or damage to goods in an amount exceeding £100 per package or unit unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

The plaintiffs contended that the defendants were in breach of Article III rule 1 i.e. they failed to make the ship seaworthy, and this caused the loss of the goods. The plaintiffs submitted that before the carrier could rely on any of the provisions of Article IV, the carrier must comply with the provisions of Article III rule 1.

Held, dismissing the plaintiffs' claim: the Bill of Lading issued by the defendants and accepted by the plaintiffs was evidence of the contract of carriage by sea entered into by the parties. The voyage during which the plaintiffs' goods were lost was clearly a voyage the subject of the contract of carriage of goods by sea to which the Carriage of Goods by Sea Act applies;

(2) the defendants succeeded on the sole issue, that is, that Article IV rule 5 of the Hague Rules as incorporated in the Carriage of Goods by Sea Act applied to limit the liability of the defendants.

Cases referred to:-

(1) *Maxine Footwear Co. Ltd.* v. *Canadian Government Merchant Marine Ltd.* [1959] A.C. 589.

(2) *Falconbridge Nickel Mines* v. *Chimo Shipping Ltd.* [1969] 2 Lloyd's L.R. 277.

CIVIL SUIT.

G. Pannirselvam for the plaintiffs.

S. Selvadurai for the defendants.

Cur. Adv. Vult.

Wee Chong Jin C.J.: National Jaya (Pte) Ltd., the plaintiffs, had 7 cases of marble slabs and 3 cases of glass mosaic worth $28,768 to send to Pertamina of Jakarta, Indonesia. Hong Tat Marine Shipping Pte. Ltd., the defendants, agreed to ship them on their vessel "Hai Sing" from Singapore to Merak, a port near Jakarta and issued a Bill of Lading for these goods. The value of the goods was not declared by the plaintiffs before shipment and not inserted in the Bill of Lading.

The "Hai Sing" was a barge which had no moveable rudder and had no steering power of its own. It was being towed by another vessel belonging to the defendants. It's deadweight was 785.6 long tons or approximately 800 metric tons but it was in fact carrying 966 metric tons of cargo on the voyage to Merak. On approaching Merak, the tug decided to anchor for the night to await clearance the next day and proceeded to shorten the tow line. During this operation the barge overran the tow line which became entangled necessitating cutting the tow line. The barge's rear anchor was dropped but because of strong wind and waves the anchor snapped and the barge was grounded. Water entered and flooded two hatches, resulting in a total loss of the plaintiffs' goods. They claimed against the defendants for their loss.

The only issue to be decided is whether or not, on the above facts which are not in dispute, Article IV rule 5 of the Hague Rules as incorporated in the Carriage of Goods by Sea Act (Cap. 184) applied to limit the liability of the defendants. Article IV rule 5 reads as follows: —

"Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding £100 per package or unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading."

It is conceded that the defendants were in breach of Article III rule 1 which reads as follows: —

"The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to —

(a) make the ship seaworthy;

(b) properly man, equip and supply the ship;

(c) make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation."

It is also conceded that the non-fulfilment of Article III rule 1 caused the loss of the plaintiffs' goods.

The plaintiffs contend that before the carrier can rely on any of the provisions of Article IV the carrier must comply with the provisions of Article III rule 1. They rely on the case of *Maxine Footwear Co. Ltd.* v. *Canadian Government Merchant Marine Ltd.*[1] as binding authority in support of their contention.

In that case, the respondents' ship, while in port and after loading had begun, caught fire owing to the negligence of their servants. The appellants' goods which had been loaded under a bill of lading incorporating the Canadian Water Carriage of Goods Act, 1936, to which were scheduled the Hague Rules, were lost. On the evidence the Judicial Committee of the Privy Council said that it was plain that from the time when the ship caught on fire she was unseaworthy; that this unseaworthiness caused the damage to and loss of the appellants' goods and that the negligence of the respondents' servants which caused the fire was a failure to exercise due diligence. The Privy Council held that the appellants were entitled to recover damages for their loss and in their judgment they dealt with a submission of the respondents as follows: —

"Logically, the first submission on behalf of the respondents was that in cases of fire Article III never comes into operation even though the fire makes the ship unseaworthy. All fires and all damages from fire on this argument fall to be dealt with under article IV, rule 2(b). If this were right there was at any rate a very strong case for saying that there was no fault or privity of the carrier within that rule, and the respondents would succeed.

In their Lordships' opinion the point fails. Article III, rule 1, is an overriding obligation. If it is not fulfilled and the non-fulfilment causes the damage the immunities of article IV cannot be relied on. This is the natural construction apart from the opening words of article III, rule 2. The fact that that rule is made subject to the provisions of article IV and rule 1 is not so conditioned makes the point clear beyond argument."

The defendants contend that the *Maxine* case is distinguishable in that rule 5 of Article IV was not relied on by the carrier and therefore was never considered by the Privy Council. Furthermore, the decision is a limited one. Its effect is limited to "the

immunities of Article IV" and rule 5 of Article IV does not confer an immunity on the carrier but merely confers a right, the right to limit his liability for any loss or damage to the goods in an amount not exceeding £100 per package or unit. It is submitted that if the Privy Council had to consider rule 5 the words "in any event" therein would have to be construed.

I find myself in agreement with the defendants' contention and hold that I am not bound by the *Maxine* case. The effect of the words "in any event" is stated by the authors of the 18th Edition of *Scrutton* on Charterparties and Bills of Lading at page 441 as follows: —

"'In any event'. The limit on liability is, it is submitted, available in the event of damage by unseaworthiness where there has been no exercise of due diligence."

The authority cited in support of this submission is the Canadian case of *Falconbridge Nickel Mines* v. *Chimo Shipping Ltd.*[2] In that case the carrier expressly relied on, *inter alia*, Article IV rule 5 to limit his liability in a claim by a shipper for loss due to sinking. Kerr J. of the Exchequer Court of Canada (Quebec Admiralty District) found that the loss was due to unseaworthiness of the barge caused by the want of due diligence on the part of the carrier to make the barge seaworthy. Kerr J. also found that the immunities of Article IV rule 2 were of no avail to the carrier but that the limitation of liability in rule 5, where the words "in any event" are used, applied (see at page 298).

I find myself in agreement with Kerr J. and the submission of the authors of the 18th Edition of *Scrutton* on Charterparties and Bills of Lading but there remains to be considered another contention of the plaintiff's, namely, that the defendants were guilty of so fundamental a breach of contract as to make the voyage from Singapore to Merak not a voyage the subject of "the contract of carriage of goods by sea" to which the Carriage of Goods by Sea Act applies. The argument is that to carry the plaintiffs' goods on a rudderless barge which had to be towed by another vessel is clearly outside the contemplation of the plaintiffs when they entered into the contract of carriage of their goods by sea from Singapore to Merak.

I am unable to accept this contention. There is no evidence in support of it. The Bill of Lading issued by the defendants and accepted by the plaintiffs is evidence of the contract of carriage of goods by sea entered into by the parties and in my judgment the voyage during which the plaintiffs' goods were lost is clearly a voyage the subject of the contract of carriage of goods by sea to which the Carriage of Goods by Sea Act applies.

In the result the defendants succeed on the sole issue and there will be judgment accordingly.

Claim dismissed.

Solicitors: *Drew & Napier; Selvadurai & Emmanuel.*

THE "SAN 003";; EAST ASIA SUPPLY CO. PTE. LTD. v. THE "SAN 003" & ORS.

[O.C.J. (Sinnathuray J.) January 5, 1979]

[Singapore — Motion in Admiralty *in Rem & in Personam* No. 725 of 1978]

Practice and Procedure — Interveners — Whether interveners could set aside writ — R.S.C. 1970, O.70 r. 12.

Shipping Law — Arrest of ship — Application to set aside.

In this case the plaintiffs had taken out a writ of summons against the defendants. On an interlocutory application an order of court had been made that the remaining barges which were being built by the defendants be released to the interveners on the provision of a bank guarantee. Subsequently the plaintiffs took steps to have one of the barges arrested. The interveners thereupon applied (a) that the writ of summons be set aside and (b) that the warrant of arrest be set aside.

Held: (1) Order 70 rule 12 of the Rules of the Supreme Court, 1970, implicitly provides that so far as an intervener is concerned, the best he can have is to apply to the court for the release of the vessel. Nothing in the Rules provides for an intervener to set aside the writ of summons itself;

(2) in this case the arrest of the vessel was an abuse of the process of the court and the warrant of arrest should be discharged, but the writ of summons against the second defendants should be proceeded with.

Case referred to:-

(1) *The Lord Strathcona* [1925] P. 143.

MOTION *IN REM & IN PERSONAM.*

Bachoo Mohan Singh for the plaintiffs.

Arul Chandran (*Prem Gurbani* with him) for the interveners.

Sinnathuray J. (delivering oral judgment): In this admiralty action *in rem*, the plaintiffs are East Asia Supply Co. Pte. Ltd., and the second defendants are Middle East Shipyard Pte. Ltd. The writ of summons was issued on 13th of December 1978. Seven days later, Sin Chin Seng Shipbuilding Pte. Ltd., the interveners, were granted leave to intervene, and it is set out in the affidavit on their behalf, that "the interveners intend to move the court by motion to set aside the arrest of the plaintiffs". On the next day, December 21, the interveners filed this notice of motion, the principal prayers of which are:

(a) that the writ of summons herein be set aside;

(b) that the warrant of arrest herein be set aside; and

(c) that the plaintiffs do pay damages to the interveners for wrongful arrest of the vessel "SAN 003".

Notwithstanding the festive season, lengthy affidavits and counter-affidavits have been filed by both the plaintiffs and the interveners. At this hearing, though they have entered appearance, and have been served with the notice of motion, the second defendants are absent.

Now, the events relating to this action are somewhat extraordinary and I should say a few words to explain the background.

The Government of Burma, through its Department of Agriculture and Farm Produce Trade Cor-